

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

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In Re:

*James C. Stites,*

BKY 04-34371 DDO

Debtor.

Chapter 13

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**NOTICE OF MOTION AND MOTION OBJECTING TO CONFIRMATION OF  
CHAPTER 13 PLAN AND FOR DISMISSAL OF CASE**

TO: All parties entitled to notice under Local rule 9013-3:

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), moves the court for the relief requested below and gives notice of hearing.

2. A hearing on this motion will be held before the Honorable Dennis D. O'Brien, Courtroom 228A, U. S. Courthouse, 316 North Robert Street, St. Paul, Minnesota at 10:30 a.m. on October 14, 2004, or as soon thereafter as counsel may be heard.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on October 13, 2004, which is 24 hours (one business day) before the time set for the hearing, or filed and served by mail not later than October 8, 2004 (October 11, 2004 is a federal holiday), which is three business days before the time set for the hearing. UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. The Court has jurisdiction pursuant to 28 U.S.C. §157 and §1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this Chapter 13 case was filed on July 28, 2004. The case is now pending in this Court.

5. This motion arises under 11 U.S.C. §1307, 1322 and 1325 and Bankruptcy Rule 3015. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-3, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may pertain. Movant requests relief with respect to denial of confirmation of the Debtor's proposed Chapter 13 Plan dated July 28, 2004 (the "Plan") and dismissal of this case. If testimony is necessary as to any facts relevant to this motion, the Trustee reserves the right to call an employee of the Chapter 13 Trustee, 310 Plymouth Building, Minneapolis, Minnesota, and/or the Debtor to present testimony.

6. The Plan calls for the Debtor to make payments to the Trustee of \$635 per month for 60 months, for a total of \$38,100 (the "Plan Funds").

7. The Plan calls for the Plan Funds, net of the Trustee's estimated fee in the amount of \$2,156.60 (6.3%), to be disbursed as follows:

<u>Claimant</u>	<u>Claim Amount</u>	<u>Claim Type</u>
Attorneys' Fees	\$ 1,250.00	Priority
Internal Revenue Service ("IRS")	\$ 6,565.00	Priority
Minn. Dept. of Revenue ("MDR")	\$ 4,835.00	Priority
Ramsey County Child Support	\$ 3,363.00	Priority <sup>1</sup>
Capital One Auto	\$ 18,802.00	Secured
Unsecured Creditors	\$ 496.00	
TOTAL	\$ 38,100.00	

8. The Internal Revenue Service ("IRS") has filed Claim No. 9, amending Claim No. 5, in the total amount of \$18,820.05, of which \$11,929.62 is asserted to be an unsecured claim with priority. The Debtor estimates his obligation to the Minnesota Department of Revenue at \$4,835.00. Ramsey County Child Support has filed Claim No. 4 in the total amount of \$8,744.04. He proposes to pay Capital One Auto \$18,802.00 on a co-signed automobile loan, consistent with Capital One's proof of claim.

9. The Claim(s) either have not been objected to or amended by the Claimants, and therefore are deemed allowed under 11 U.S.C. § 502(a). Paragraph 3 of the Plan provides that the Trustee shall pay priority claims in the amounts actually allowed. Paragraph 4 of the Plan provides that the Trustee will cure the actual amounts of any defaults. The requirements of 11 U.S.C. § 1322(a)(2) preclude confirmation of a plan unless it provides for full payment of all claims entitled to priority. The requirements of 11 U.S.C. § 1325(a)(5) with respect to allowed secured claims preclude confirmation. *11 U.S.C. § 1325(a)(5)(B)*.

10. Including the priority claims of the IRS, MDR, and Ramsey County, assuming that Ramsey County's claim must be treated as an unsecured claim with priority on distribution, together with the secured claim of Capital One Auto that the Trustee may be obliged to pay, the total amount of the priority and secured claims to be paid by the Trustee is \$45,560.66.

11. There is a substantial discrepancy between the funds to be paid into the plan by the Debtor **\$38,100** and the funds needed to pay both the allowed priority claims in full and the allowed secured claims the amount provided for in the plan **\$45,560.66**, even without consideration of the Trustee's fee.

12. There is no indication that the Debtor will be able to increase payments to the Trustee to pay all allowed claims in the amount required to obtain a discharge under Section 1328 of the Bankruptcy Code.

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<sup>1</sup> It is unclear whether Claim No. 4 filed by Ramsey County Child Support should be treated as a priority claim on distribution. The Claimant has checked Box No. 7 as priority, but lists the amount due in Box No. 6, as a general unsecured claim without priority.

13. As a result of the foregoing, the plan is no longer feasible.

14. The creditors, if any, of a class lower in priority than the class of the Claim(s) may never receive the distribution contemplated under the plan.

15. As a further result of the present circumstances, the lower priority creditors, if any, will be delayed from the collection of their claims during the pendency of this Chapter 13 case.

16. The effect of these circumstances is that the lower priority creditors, if any, will have detrimentally relied upon the confirmed plan with the expectation of future payment, only to discover at the end of the plan term that they will receive no payment.

17. All of these circumstances constitute cause for dismissal under Section 1307(c).

WHEREFORE, the Movant requests entry of an order dismissing this case, or converting this case to a case under Chapter 7, and for such other relief as the Court deems just and proper.

Jasmine Z. Keller, Chapter 13 Trustee

Dated: October 6, 2004

/e/ Margaret H. Culp  
Thomas E. Johnson, #52000  
Margaret H. Culp, #180609  
Chapter 13 General Counsel  
310 Plymouth Building  
Minneapolis, MN 55402  
(612) 338-7591

### **VERIFICATION**

I, Margaret H. Culp, for Movant, declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: October 6, 2004

/e/ Margaret H. Culp

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

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In Re:

*James C. Stites,*

Case No. 04-34371 DDO

Chapter 13

Debtor.

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**MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION AND  
MOTION TO DISMISS CASE**

FACTS

The Trustee relies upon the facts set forth in her verified motion, which, for the sake of brevity, will not be repeated here.

LEGAL DISCUSSION

One of the fundamental requirements for confirmation of a Chapter 13 plan is found in 11 U.S.C. § 1322(a)(1), which states that a plan shall “provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.” *11 U.S.C. § 1322(a)(1)*. Essentially, this statute requires the debtor to propose a plan that is fully funded, in the sense that the debtor commits to making sufficient payments to pay all amounts required to be paid to creditors under the proposed plan.

Here, the Debtor has only committed to paying a total of \$38,100 to the Trustee, yet the total priority and secured claims filed to date or provided for in the Plan may exceed that number, without even taking into consideration the fact that the total Plan Funds will be reduced by the Trustee’s statutory fee.

In the alternative, the Plan fails to provide sufficient funds on a monthly basis to make the payments required by its terms, taking into account the Trustee’s fees. The Plan is under-funded and therefore unconfirmable.

Confirmation has been continued from month to month to allow the Debtor to remedy the problems with the Plan. The delay and apparent inability of the Debtor to propose a confirmable plan are prejudicial to the Debtor’s creditors and warrant dismissal for “cause” under 11 U.S.C. § 1307(c)(1).

CONCLUSION

The Debtor’s plan is not confirmable because it does not propose sufficient payments to fully fund it. Confirmation should be denied and the case dismissed.

October 6, 2004

Respectfully submitted:

Signed: /e/ Margaret H. Culp  
Thomas E. Johnson, ID #52000  
Margaret H. Culp, ID #180609  
Counsel for Chapter 13 Trustee  
310 Plymouth Building  
12 South Sixth Street  
Minneapolis, MN 55402  
(612) 338-7591

UNITED STATES BANKRUPTCY COURT  
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**UNSWORN DECLARATION FOR PROOF OF SERVICE**

I, Margaret H. Culp, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on October 6, 2004, I served Trustee's Objection to Confirmation and Notice of Hearing and Motion for Dismissal or Conversion on the individual(s) listed below, in the manner described:

**By facsimile:**

United States Trustee  
612-664-5516  
David D. Kingsbury, Esq.  
952-432-4969

**By first class U.S. mail, postage prepaid:**

James C. Stites  
6945 Macbeth Circle  
Woodbury, MN 55125

Gina McDonough, Child Support Officer  
Ramsey County Child Support  
50 West Kellogg Blvd., Ste. 415  
St. Paul, MN 55102-1552

David D. Kingsbury, Esq.  
14827 Energy Way  
Apple Valley, MN 55124

Erich M. Ramsey, Esq.  
The Ramsey Law Firm, P.C.  
P.O. Box 201347  
Arlington, TX 76006  
Attorneys for Capital One Auto Finance Dept., Acct. No. 224635

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: October 6, 2004

/e/ Margaret H. Culp

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

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In re:

BKY 04-34371 DDO

*James C. Stites,*

Chapter 13

Debtor.  
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**ORDER SUSTAINING OBJECTION TO CONFIRMATION AND DISMISSING  
CASE**

At St. Paul, Minnesota \_\_\_\_\_, 2004

The above-entitled matter came on for hearing before the undersigned United States Bankruptcy Judge on Chapter 13 Trustee's Objection to Confirmation and Motion for dismissal or conversion of the Chapter 13 case.

Appearances were as noted in the minutes.

Upon the foregoing motion, the arguments of counsel, and all of the files, records and proceedings herein:

**IT IS ORDERED:**

1. The Trustee's Objection to Confirmation is **SUSTAINED**.
2. The Chapter 13 case is **DISMISSED**.

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Dennis D. O'Brien  
United States Bankruptcy Judge